Supreme Court, U.S.
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No. 91-250

In The

Supreme Court of the United States

October Term, 1991

MARGARET C. BLANK, et al.,

Petitioners,

vs.

BETHLEHEM STEEL CORPORATION, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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October, 1991

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QUESTION PRESENTED BY RESPONDENTS

Should the Supreme Court of the United States issue a Writ of Certiorari to the Eleventh Circuit Court of Appeals to review its decision that Respondents did not arbitrarily and capriciously deny non-accrued retirement benefits to the petitioners, so as to violate the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq*?

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that the following persons are the only persons known to have an interest in the outcome of this case:

1. Plaintiffs and appellants below, petitioners in this Court, are: Margaret C. Blank, Donald E. Alford, Jeanne Cornwell, John DeCarlo, Donald D. Downs, William D. Harrel, Walton W. Hood, Gary L. Lacher, Woodrow L. Lewis, Robert A. Perry, John M. Pfister, Robert C. Potter, Robert C. Schwienteck, Thomas E. Thompson, Kyle M. Tincher, Norman E. Williams and Richard C. Wolanin.

2. Counsel for plaintiffs and appellants below, petitioners in this Court, is John F. MacLennan of Kattman, Eshelman & MacLennan, P.A.

3. Defendants and respondents below, respondents in this Court are the Bethlehem Steel Corporation, a Delaware corporation, and the Bethlehem 1985 Salaried Pension Plan. Subsidiaries which are not wholly owned by Bethlehem Steel Corporation include:

Chiles-Alexander International Inc.

Empreendimentos Brasileiros de Mineracao S.A.-E.B.M.

G&A Limited Partnership III-A

Griffin-Alexander International, Inc.

India Offshore Inc.

Indiana Pickling and Processing Company, an Indiana General Partnership

Iron Ore Company of Canada

CERTIFICATE OF INTERESTED PARTIES–Continued

CENTEC, a Joint Venture

Presque Isle Corporation

Restauradora de las Minas de Catorce, S.A. de C.V.

Seadrill, Inc.

Walbridge Coatings, an Illinois Partnership

Rig V Limited Partnership

Ontario Iron Company

Rig VI Limited Partnership

Bethlehem Singapore Private Limited

Carol Lake Company, Ltd.

Gulf Power Company

Quebec North Shore and Labrador Railway Company Inc.

Retty Metals, Ltd.

Iron Ore Land Company

Northern Land Company, Limited

Schefferville Power Company

Twin Falls Power Corporation Limited

Mineracoes Brasileiras Reunidas-MBR

4. Counsel for defendants and respondents below, and respondents in this Court, are Richard J. Omata and

CERTIFICATE OF INTERESTED PARTIES–Continued

Dennis H. Walters Of Karr Tuttle Campbell. E. Lanny Russell of Smith & Hulsey served as local counsel for defendants in the action below.

5. The trial court decision was rendered by the Honorable Howell W. Melton. The Eleventh Circuit Court of Appeals decision was rendered by the Honorable Frank M. Coffin.

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COUNTERSTATEMENT OF THE CASE AND FACTS

On August 29, 1986, Bethlehem Steel Corporation ("Bethlehem") sold the facilities which it had operated as its Buffalo Tank Division ("Division") to the Buffalo Tank Corporation of Delaware ("Buyer"). The Division designed and fabricated welded steel plate products, including storage tanks and piping. At the time of the sale, the Division employed approximately 300 union-represented and non-represented employees at facilities in Maryland, Florida, Michigan, Massachusetts, New York, and North Carolina. The sale was structured as one of an ongoing business, providing significant employment, compensation and benefits protection for Division employees. In this regard, Section 8.01 of the "Agreement of Purchase and Sale Between Bethlehem Steel Corporation and Buffalo Tank Corporation of Delaware" ("Sale Agreement") provided that:

> The Buyer shall offer employment to all of the Division's represented and non-represented employees actively at work on the date of the Closing in substantially the same positions as they were employed at the Closing.
>
> * * *
>
> The benefits, benefit plans and rates of pay established by the Buyer and applicable to non-represented Division employees who go to work for the Buyer shall be substantially the same as those applicable to such employees as of the Closing. . . .Moreover, the Buyer's pension plans shall provide credit to the Division's employees for prior service as employees of Bethlehem for all purposes under the Buyer's plans; *provided, however,* that benefits payable

> under any defined benefit pension plan so established by the Buyer may be offset (or reduced) by any pension benefits received, or which a person upon application would be entitled to receive, under Bethlehem's defined benefit pension plans.

Appendix 1 at pp. 1-2.

The Sale Agreement specified that the Buyer intended to operate all of the Division's facilities for at least two years after Closing. As of the entry of the Trial Court's judgment, the Buyer had complied with all of its above-described obligations.

Petitioners, none of whom were represented by a union and all of whom were covered by Section 8.01 of the Sale Agreement, claim that as a result of the sale of the Division they became entitled to receive Rule-of-65 Retirement benefits from Bethlehem under the terms of the 1985 Bethlehem Salaried Pension Plan ("Plan").

The Rule-of-65 pension being sought by petitioners differs from voluntary pensions, also provided for in the Plan, in that in order to be eligible for the former a participant must not only meet minimum age and service requirements, but must also incur a break in continuous service due to specifically defined occurrences, such as a layoff or disability, or an absence from work by reason of a layoff resulting from an election to be placed on layoff status due to a permanent shutdown of a plant, department or subdivision.

Relevant portions of Section 2.7 of the Plan describe the following conditions of eligibility for Rule-of-65 Retirement:

> Any participant (i) who shall have had at least 20 years of continuous service as of his last day worked, (ii) who has not attained the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 or more but less than 80, and
>
> (a) whose continuous service is broken by reason of a layoff or disability, or
>
> (b) whose continuous service is not broken and who is absent from work by reason of a layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown of a plant, department or subdivision thereof,
>
> * * *
>
> and who has not been offered suitable long-term employment as such employment is determined in accordance with rules and regulations adopted by the General Pension Board, shall be eligible to retire on or after January 1, 1986, and shall upon his retirement (hereinafter "Rule-of-65 retirement") be eligible for a pension;. . .

Appendix 2 at pp. 9-10.

Although each of the petitioners met the age and service requirements set forth in the introductory paragraph of section 2.7, they did not meet either of the additional requirements set forth in subparagraphs 2.7(a) or 2.7(b).

Section 8.1(b) of the Plan authorizes the Board and the Plan Administrator:

> To make and enforce such rules and regulations . . . necessary or proper for the efficient

> administration of this Plan, and to decide such questions as may arise in connection with the operation of this Plan.

Appendix 2 at p. 11.

Section 5.3(c) of the Plan provides that:

> Service with another employer to which an Employing Company sells or transfers all or part of a plant, department, division, location, facility, subsidiary or other unit of such Employing Company may be credited as continuous service under this Plan in accordance with and for such purposes as may be set forth in rules and regulations adopted by the General Pension Board with respect to each such sale or transfer.

Appendix 2 at p. 10.

Pursuant to Section 5.3(c), the General Pension Board ("Board") carefully examined the terms of the Sale Agreement as it affected Division employees and adopted "Rules and Regulations Governing Continuous Service Under the Bethlehem 1985 Salaried Pension Plan in Connection with the Sale of the Buffalo Tank Division of Bethlehem Steel" ("Rules and Regulations") by resolution dated August 28, 1986.

Under those Rules and Regulations, Division employees, such as the petitioners, who were: accruing continuous service under the Plan as of Closing; not eligible for an immediate voluntary pension as of the date of Closing, or who chose not to elect to receive an immediate voluntary pension; and were employed by the Buyer at or after Closing were deemed not to have broken continuous service under the Plan as a result of the sale

of the Division. Appendix 3 at pp. 13-14. Thus, the requirement set forth in Section 2.7(a) that there be a break in continuous service was not met. The Rules and Regulations also provide that service with the Buyer for such employees is credited as continuous service for determining vesting and eligibility for immediate voluntary pensions, deferred vested pensions and surviving spouse's benefits under the Plan, but is not credited for purposes of determining the amount of any pension or surviving spouse's benefits under the Plan.

The petitioners also failed to meet the requirements of Section 2.7(b) because they were not absent from work as a result of electing to be placed on layoff status as a result of a "permanent shutdown of a plant, department or subdivision thereof." In a Pretrial Stipulation filed in the District Court, petitioners and respondents agreed: (1) that on every occasion when a Bethlehem division or facility had been sold as an ongoing entity [and thus had not been permanently shut down for purposes of Section 2.7(b) of the Plan] Bethlehem had obtained an agreement from the purchaser which required the purchaser to provide the employees of the affected division or facility with employment, compensation and benefits protection of the type set forth in Section 8.01 of the Sale Agreement; (2) that on every occasion when a Bethlehem division or facility had been permanently shut down as that term is used in Section 2.7(b), employment, compensation and benefits protection had not been provided for the affected employees, and those employees who were eligible had received Rule-of-65 benefits even though a purchaser of the assets of the shutdown facility might have later hired

some of said employees; (3) that each plaintiff-petitioner had been treated in accordance with Section 8.01 of the Sale Agreement; and (4) that each plaintiff-petitioner had been treated in accordance with Section 5.3(c) of the Plan and with the Rules and Regulations. Appendix 4 at pp. 16-18, 20-21.

On September 5, 1989, respondents moved for summary judgment. The issues presented to the District Court were: Whether the benefits at issue were not accrued within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1145 and therefore could be lawfully reduced; whether the Board's decision to deny said benefits should be measured against a *de novo* or an arbitrary and capricious standard; and whether the Board acted arbitrarily and capriciously in denying said benefits to petitioners. On the basis of the facts set forth in the Pretrial Stipulation and other evidence introduced in conjunction with the motion, the District Court granted summary judgment in favor of respondents and dismissed all claims against respondents on February 9, 1990. The Eleventh Circuit Court of Appeals affirmed this decision and denied petitioners' request for rehearing on May 13, 1991. Petitioners seek review only of the Court of Appeals' determination that the Board did not act arbitrarily and capriciously in denying petitioners' claim for Rule-of-65 benefits. Petitioners apparently do not contend that the lower courts erred in concluding that no material issues of fact were in dispute that would have precluded the granting of the Trial Court's Summary Judgment.

ARGUMENT

A. The Petition Should Be Denied Because It Does Not Raise Any Conflict Between United States Courts of Appeals or An Important Question of Federal Law.

Supreme Court Rule 10 sets forth the considerations applicable to the Court's exercise of discretion in granting a Writ of Certiorari. Of the three factors set forth in Rule 10, the only factor which petitioners contend is applicable in this case is the one set forth in Rule 10(a) that "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." There is no such conflict in this case.

Petitioners contend in their Brief, at page 20, that the Eleventh Circuit Court of Appeals' decision is in conflict with other circuits because, in this case, the Eleventh Circuit affirmed a decision which treated similarly situated plan participants differently, and because such a decision therefore constituted an arbitrary and capricious action under *Jung v. FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985) and *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1354 (9th Cir. 1984). Petitioners' state: "under similar situations, the Plan had granted Rule-of-65 benefits even where the division for which the employees worked was also sold off, continued to operate, and employed the employees," and hence that the Plan had engaged in "inconsistent treatment." Petitioners' Brief at 19-20.

Petitioners' reliance on *Jung* and *Blau* is misplaced. In *Jung*, the Ninth Circuit determined that it was not arbitrary and capricious for an employer to refuse to pay

severance benefits to employees upon the divestiture of a division when the purchaser of the division agreed to provide comparable employment to the affected employees. In *Blau*, which also involved a severance plan, the plan had been kept secret from the employees, the employer was characterized as having engaged in pervasive violations of ERISA and the plan language did not permit the employer to exercise discretionary authority of the type accorded the Board in the instant case.

Petitioners' contention is fundamentally at odds with the facts of this case and with the findings and holdings in this case by the District Court and Court of Appeals. In large measure the District Court and the Court of Appeals based their decisions on facts which were agreed upon by all parties and set forth in the Pretrial Stipulation. Unlike the situation in *Blau*, the petitioners were treated in strict accordance with the Plan and its attendant Rules and Regulations and in the same manner as other similarly situated plan participants in that whenever a sale of a Bethlehem facility occurred, where employment, compensation and benefits protection was provided to affected employees, Rule-of-65 benefits were not provided. Conversely, whenever such protection was not provided, Rule-of-65 benefits were granted to eligible employees. Thus, there exists no factual basis for the petitioners to argue that they were treated differently than similarly situated plan participants or for any court to determine that it was arbitrary and capricious for the Board to deny petitioners' request for Rule-of-65 benefits. Therefore, there exists no conflict between the Eleventh Circuit's decision in this case and any decision in another Circuit.

The petitioners contend that a conflict exists between the Court of Appeals' decision in this case and a case arising out of the Sixth Circuit, *Varhola v. Doe*, 657 F. Supp. 595 (S.D. Ohio 1986), aff'd in part and remanded, 820 F.2d 809 (6th Cir. 1987). The petitioners further contend that the facts in *Varhola* are in all material respects identical to the facts in this case. In *Varhola*, the district court initially held that since the original owner of a facility no longer operated the facility after its sale, the sale constituted a shutdown for purposes of the original owner's pension plan. This ruling was contrary to the decision which had been reached by the administrator of the plan.

At pages 26 – 31 of their Brief, the petitioners cite to the district court decision in *Varhola* for the proposition that the Court of Appeals in this case improperly interpreted what constitutes a shutdown for benefit purposes. The petitioners fail to point out, however, that the Sixth Circuit remanded the *Varhola* case to the district court so that the plan administrator's decision could be reviewed under the arbitrary and capricious standard. On remand, the district court determined that the plan administrator's decision that the sale of the facility as an ongoing entity did not constitute a shutdown had not been arbitrary and capricious. This determination was not further appealed. See *Varhola v. Cyclops Corp.*, 914 F.2d 259 (6th Cir. 1990). The Sixth Circuit's unreported opinion in *Varhola* is set forth in Appendix 5. Thus, there is no conflict whatsoever between the holding by the Court of Appeals in this case and the Sixth Circuit's decision in *Varhola*.

B. The Petition Should Be Denied Because The District Court and Court of Appeals Were Correct in Holding That The Board Did Not Act Arbitrarily and Capriciously in Denying Rule-of-65 Benefits to Petitioners Because They Did Not Suffer a Break in Continuous Service Under Section 2.7(a) of the Plan and Because the Sale of the Division Did Not Constitute a Permanent Shutdown Under Section 2.7(b) of the Plan.

The petitioners claim they are entitled to receive Rule-of-65 Retirement even though they were employed by the Buyer in substantially the same jobs and at the same pay and benefits, and even though they did not meet the criteria for Rule-of-65 Retirement set forth in the Plan and in the Rules and Regulations adopted by the Board. Petitioners' claim is based upon alternative assertions that: (1) under Plan Section 2.7(a) their continuous service was broken and they were laid off when Bethlehem ceased to employ them and (2) under Plan Section 2.7(b) the sale of the Division constituted a permanent shutdown of a Bethlehem department or subdivision, resulting in a layoff of the petitioners. According to petitioners, the Board's refusal to agree with petitioners' interpretation of Sections 2.7(a) and (b) was arbitrary and capricious.

Bethlehem submits that both the District Court and the Court of Appeals were correct in holding that the Board did not act arbitrarily and capriciously in determining that petitioners' continuous service had not been broken. In so deciding, the Courts found that the Board had interpreted the terms of the Plan rationally and in good faith, using as guidance such factors as the uniformity

of the Board's construction, the reasonableness of the Board's reading of the Plan, and the extent to which concern over the future financial health of the Plan may underlie its interpretation of the Plan's terms. *See, Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 87, 39 (11th Cir. 1989); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir. 1985).

Not only do Sections 5.3(c) and 8.1(b) of the Plan give the Board the discretionary authority to adopt rules and regulations which determine whether an employee's service with another employer to which Bethlehem has sold or transferred a division or other unit will be credited as "continuous service," but the language of Section 5.3(c) clearly contemplates that the rules and regulations adopted for a particular sale will be unique to that sale. There is no requirement or expectation that the rules and regulations adopted by the Board will be identical for every sale, or even that they will be consistent from sale to sale. Indeed the broad grant of discretion to the Board to adopt specific rules and regulations for each sale reflects that the Plan contemplates that in some situations, sales will not trigger a break in service necessary for Rule-of-65 benefits. Notwithstanding this broad grant of discretion, and as is evident from the Pretrial Stipulation, Plan participants involved in similarly structured sales of divisions or facilities have all been treated similarly for benefits purposes. All of the sales arranged as sales of an ongoing business provided for employment, compensation and benefits protection for affected employees and did not allow for Rule-of-65 benefits. All of the sales structured as sales of permanently shutdown assets did not provide for continued employment or for

the protection of compensation and benefits, but did allow Rule-of-65 benefits for eligible employees. Given the structure of the sale of the Division, it was not unreasonable for the Board to define the sale as something other than a permanent shutdown of a division. Indeed, it would have been odd for the Board to treat this sale, with its promise of the continuation of operations at comparable rates of pay and benefits, as a "permanent shutdown" as that phrase is commonly understood. *Cf. Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1348-50 (4th Cir. 1989); *Lakey v. Remington Arms Co.*, 874 F.2d 541, 544-45 (8th Cir. 1989); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045-48 (7th Cir. 1988); *Accardi v. Control Data Corp.*, 836 F.2d 126, 128-29 (2nd Cir. 1987); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 626-27 (6th Cir. 1987); *Jung v. FMC Corp.*, 755 F.2d 708, 712-15 (9th Cir. 1985).

Section 5.3(c) of the Plan gave the Board the discretion to adopt rules and regulations which treated the continuous service of the Division's employees in a manner consistent with Section 8.01 of the Sale Agreement between Bethlehem and the Buyer. Petitioners have stipulated that they were treated in accordance with Plan Sections 2.7 and 5.3(c), in accordance with the Rules and Regulations and in accordance with Section 8.01 of the Sale Agreement. Therefore, the Board acted rationally and in good faith in determining that petitioners did not satisfy the conditions for Rule-of-65 Retirement specified in Section 2.7(a) of the Plan. To require the Board to grant Rule-of-65 benefits to participants still being credited

with continuous service would require the Board to act in direct contradiction of the terms of the Plan.

Petitioners argue that the sale of the Division was a "permanent shutdown," as that term is used in Plan Section 2.7(b), because Bethlehem ceased to own and operate the Division. In support of this argument, petitioners contend they were treated differently than other similarly situated participants and that this treatment was therefore arbitrary and capricious. Petitioners, however, adopt too narrow a view of the issue of disparate treatment.

Section 5.3(c) of the Plan clearly contemplates that the Board must examine each "sale or transfer" of a Division in establishing Rules and Regulations governing continuous service for participants affected by the transaction. This is different than saying that the Board must separately examine and compare the treatment of discrete individuals in different sales. As the Eleventh Circuit stated,

> The fact that some salaried employees from those other sales were employed by the purchasing corporation does not create a material factual dispute about the nature of each sale as a whole.

Blank v. Bethlehem Steel Corp., 926 F.2d 1090, 1094-95 (11th Cir. 1991).

The stipulated facts amply demonstrate that the Board consistently determined that a permanent shutdown had not occurred in situations where employees were provided with employment, compensation and benefits protection of the type provided in Section 8.01 of the Sale Agreement, and consistently determined that a shutdown had occurred in situations where employees did

not receive such protection. Moreover, with regard to the sale of the Division, the Board, consistent with past practice and after due consideration of the protection provided to employees by Section 8.01 of the Sales Agreement, held that a permanent shutdown had not occurred.

The Board's determination that the transaction in dispute was not a shutdown is consistent with existing case law. See cases cited at p. 12, *supra*. Payment of Rule-of-65 benefits to petitioners would be an obvious windfall; avoiding this result is a clearly reasonable objective.

Given the discretion the Plan provides the Board to respond to the particular benefits treatment afforded Plan participants as the result of a given sale, the consistency with which the Board has carried out this charge and the failure of petitioners to offer sufficient material facts or case law from which it could be concluded that the Board acted arbitrarily and capriciously when it determined that a permanent shutdown had not occurred, the rulings below should be sustained.

CONCLUSION

Petitioners claim they have a vested right to receive immediate Rule-of-65 Retirement pensions even though they have not met the requirements for that benefit. Their claim has no basis in fact or law. Rule-of-65 Retirement is a contingent, unaccrued benefit, intended specifically to provide pension benefits to persons under certain, carefully delineated circumstances involving the elimination

of employment opportunities. Those circumstances do not exist in this case.

Bethlehem and the Board have acted in full compliance with ERISA, applicable case law, the clear language of the Plan and its attendant Rules and Regulations, and in accordance with past practice. At no time and in no respect has the Board acted arbitrarily or capriciously. Petitioners have cited no case law to suggest that a conflict exists within the Circuits with regard to the issue at hand. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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October, 1991

APPENDIX 1

AGREEMENT OF PURCHASE AND SALE

between

BETHLEHEM STEEL CORPORATION

and

BUFFALO TANK CORPORATION OF DELAWARE

* * *

ARTICLE 8
PENSION AND BENEFIT MATTERS

Section 8.01 *Sale as an Ongoing Business.*

The parties intend that the sale described herein shall be of the Division as an ongoing business and therefore shall not constitute a permanent shutdown of the Division's operations for purposes of entitling any of the Division's employees to immediate payment of pension or severance pay benefits or any other shutdown related benefits under Bethlehem's existing labor agreements, pension plans or employment policies applicable to the Division's employees immediately prior to the Closing. Consistent with such intent of the parties, the parties agree to the following:

(a) The Buyer shall offer employment to all of the Division's represented and nonrepresented employees actively at work on the date of the Closing in substantially the same positions as they were employed at the Closing. Should additional employees be required in nonbargaining unit positions within two (2) years after the Closing, the Buyer shall offer employment first to the nonrepresented employees of the Division who were on layoff status at such location as of the Closing. Recall to

bargaining unit positions shall be governed by the provisions of the Labor Agreements. Nonrepresented and represented employees who are absent from work at the Closing for reasons other than layoff (e.g. leave of absence or disability) shall be offered employment by the Buyer if they would otherwise be reinstated by Bethlehem in the absence of the sale prior to incurring a break in service with Bethlehem.

(b) The benefits, benefit plans and rates of pay established by the Buyer and applicable to nonrepresented Division employees who go to work for the Buyer shall be substantially the same as those applicable to such employees as of the Closing. The Buyer's benefits, benefit plans and rates of pay applicable to represented employees shall be as set forth in the Labor Agreements. Moreover, the Buyer's pension plans shall provide credit to the Division's employees for prior service as employees of Bethlehem for all purposes under the Buyer's plans; *provided, however,* that benefits payable under any defined benefit pension plan so established by the Buyer may be offset (or reduced) by any pension benefits received, or which a person upon application would be entitled to receive, under Bethlehem's defined benefit pension plans.

(c) The Buyer shall assume all of the obligations of Bethlehem under the Labor Agreements listed on Exhibit L, it being understood that the Buyer shall establish its own plans to provide benefits under the Labor Agreements.

(d) The Buyer shall not assume or be responsible for any liability in respect of benefits under Bethlehem's

benefit plans which are payable at any time to, or in respect of, any former or present Division employee not employed by the Buyer after the Closing. Furthermore, Bethlehem shall be responsible for all claims of the Division's employees who are employed by the Buyer which (i) arise, within the meaning of any existing benefit program maintained by Bethlehem for the Division's employees, prior to the date of the Closing and (ii) are payable under the terms and conditions of such program. The Buyer shall be responsible for all such claims for benefits which (i) arise, within the meaning of any benefit program maintained by the Buyer for its employees on or after the date of the Closing and (ii) are payable under the terms and conditions of such program.

(e) The Buyer intends to operate all of the facilities of the Division for at least two (2) years after the Closing. The Buyer shall assume any pension or severance pay benefit liability or any other shutdown related benefit liability arising on account of shutdowns after the Closing but shall not assume any such liability for any shutdowns prior to the Closing or as a result of the sale of the Assets pursuant to this Agreement if unrelated to the Buyer's operation of the facilities of the Division after the Closing. Bethlehem shall have no obligation to the Buyer with respect to any liability incurred by the Buyer for pension or severance pay benefits or any other shutdown related benefit liability arising on account of a shutdown of any facility of the Division after the Closing notwithstanding that immediate pension benefits are not payable under Bethlehem's pension plans by reason of such a shutdown.

(f) Bethlehem shall take or cause to be taken appropriate action to provide that after the Closing, the following shall apply with respect to certain Bethlehem benefit plans applicable to the Division's nonrepresented employees:

Bethlehem 1985 Salaried Pension Plan

(1) Division employees who are eligible for, and elect to receive, an immediate voluntary pension (i.e., 65/10, 62/15, 30-year or 60/15 pension) as of the Closing and who are hired by the Buyer and former Bethlehem employees who are retired as of the Closing and who subsequently are hired by the Buyer shall not have service with the Buyer credited as continuous service for Bethlehem pension plan purposes and such persons may receive (or continue to receive) a Bethlehem pension notwithstanding their employment with the Buyer;

(2) Division employees who are not eligible to receive an immediate voluntary pension as of the Closing and who are hired by the Buyer, and Division employees who are eligible for but do not elect to receive an immediate voluntary pension as of the Closing, and who are hired by the Buyer shall not break continuous service for Bethlehem pension plan purposes as of the Closing;

(3) for employees referred to in (2) above, service with the Buyer will be credited under the plan applicable to them as of the Closing for vesting and eligibility for immediate voluntary pension, deferred vested pension

and surviving spouse's benefit purposes only and not for benefit accrual purposes;

(4) for employees referred to in (2) above, service will break as of the earlier of the date the former employee (i) attains eligibility for and elects to receive an immediate voluntary pension based on service with Bethlehem and the Buyer or (ii) permanently terminates employment with the Buyer (in accordance with the rules for determining breaks in continuous service then applicable to Bethlehem employees);

(5) the applicable plan will be the plan applicable to the former Division employee as of the Closing, regardless of the date of actual retirement; and

(6) a Division employee who refuses an offer of employment by the Buyer will be considered a quit for purposes of the plan applicable to such employee.

Savings Plan and Retirement Account

(1) Division employees who, as of the Closing, are eligible for and elect to receive an immediate voluntary pension under the Bethlehem 1985 Salaried Pension Plan shall be treated for purposes of the Savings Plan and Retirement Account the same as any other Bethlehem retiree;

(2) Division employees who (i) are not eligible to receive an immediate voluntary pension under the Bethlehem 1985 Salaried Pension Plan or (ii) are eligible for but have not elected to receive such a pension and who

are hired by the Buyer shall not break continuous service for purposes of the Savings Plan and the Retirement Account as of the Closing, except that for purposes of applying the provisions of such plans relating to a transfer from such plan or plans to a qualified plan of the Buyer (if one exists) the employee may be regarded as having incurred a termination of employment if a timely request is received; however, such employees shall not be eligible to make or have contributions made to the Savings Plan or the Retirement Account on their behalf after the Closing;

(3) for employees referred to in (2) above, service with the Buyer will be credited under the Savings Plan and Retirement Account for vesting purposes;

(4) for employees referred to in (2) above, service will break as of the earlier of the date the former employee (i) attains eligibility for and elects to receive an immediate voluntary pension under the Bethlehem 1985 Salaried Pension Plan or (ii) permanently terminates employment with the Buyer (in accordance with the rules for determining breaks in continuous service then applicable to Bethlehem employees); and

(5) a Division employee who refuses an offer of employment by the Buyer will be considered a quit for purposes of the Savings Plan and the Retirement Account.

Bethlehem Life Insurance and Medical Coverage
Life Insurance

(1) Bethlehem life insurance coverage applicable to active employees will terminate as of the Closing for all Division employees; and

(2) Division employees who, as of the Closing, are eligible to receive an immediate voluntary pension under the Bethlehem defined benefit pension plan applicable to them shall be provided Bethlehem retiree life insurance coverage when they retire under such pension plan.

Medical Coverage

(1) coverages applicable to active employees (CMP) terminate as of the Closing for all Division employees;

(2) all claims incurred prior to the Closing shall be Bethlehem's responsibility; and

(3) Division employees who, as of the Closing, are eligible to receive an immediate voluntary pension (other than a 65/10 pension with less than 15 years of service) under the Bethlehem defined benefit pension plan applicable to them shall be provided Bethlehem retiree medical insurance coverage when they retire under such pension plan.

(g) Prior to the Closing, Bethlehem shall advise the Buyer of the actions that Bethlehem shall take or cause to be taken with respect to certain Bethlehem benefit plans applicable to the Division's represented employees.

(h) After the Closing, the Buyer and Bethlehem shall each provide the other on a continuing basis at no cost to the other such information regarding former Division employees who are employed by the Buyer as the other shall reasonably request in order to permit proper administration of its various benefit plans as applicable to such employees.

APPENDIX 2

BETHLEHEM
1985 SALARIED
PENSION PLAN

Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies adopted January 25, 1923, as amended December 31, 1985, through October 28, 1987, applicable to eligible salaried employees.

RULE-OF-65 RETIREMENT

2.7 Any participant (i) who shall have had at least 20 years of continuous service as of his last day worked, (ii) who has not attained the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 of more but less than 80, and

(a) whose continuous service is broken by reason of a layoff or disability, or

(b) whose continuous service is not broken and who is absent from work by reason of a layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown of a plant, department or subdivision thereof, . . .

* * *

and who has not been offered suitable long-term employment as such employment is determined in accordance with rules and regulations adopted by the General Pension Board, shall be eligible to retire on or after January 1, 1986, and shall upon his retirement (hereinafter "rule-of-65") be eligible for a pension; provided, however, that, if he shall be covered

by a labor agreement to which his Employing Company is a party, he shall be entitled to receive a pension pursuant to the provisions of the foregoing subparagraphs (b) and (c) only if such labor agreement provides for the above-mentioned election and only subject to any terms and conditions relating to the receipt of such pension that shall be contained in such labor agreement; and provided, further, however, that if at the time of application for retirement his Employing Company has not yet determined whether the participant will be offered suitable long-term employment, the participant will not be eligible to retire until the earlier of the date on which the Employing Company advises the participant that he will not be offered suitable long-term employment or the date on which the participant incurs a break in continuous service.

* * *

SECTION 5. DETERMINATION OF CONTINUOUS SERVICE

* * *

5.3(c) Service with another employer to which an Employing Company sells or transfers all or part of a plant, department, division, location, facility, subsidiary or other unit of such Employing Company may be credited as continuous service under this Plan in accordance with and for such purposes as may be set forth in rules and regulations adopted by the General Pension Board with respect to each such sale or transfer.

* * *

SECTION 8. ADMINISTRATION

8.1 A General Pension Board shall have the authority and responsibility for the administration of this Plan. The General Pension Board shall consist of five or more officers or employees of the Employing Companies to be appointed by the Board of Directors of the Corporation and to serve until their successors shall have been appointed in like manner. The General Pension Board shall appoint a Secretary and such Assistant Secretaries as it shall deem necessary or proper. Subject to action by the General Pension Board, the Secretary of the General Pension Board shall be the administrator of this Plan (herein "Plan Administrator") for all purposes of ERISA with the powers and duties provided therein and in this Plan, including the following powers and duties:

(a) To grant such pensions as are provided for under this Plan.

(b) To make and enforce such rules and regulations (herein "the Regulations") as the Plan Administrator shall deem necessary or proper for the efficient administration of this Plan, and to decide such questions as may arise in connection with the operation of this Plan.

* * *

APPENDIX 3

Rules and Regulations Governing Continuous Service Under the Bethlehem 1985 Salaried Pension Plan in Connection with the Sale of the Buffalo Tank Division of Bethlehem Steel Corporation

A. General Provisions

Pursuant to Section 5.3(c) of the Bethlehem 1985 Salaried Pension Plan (hereinafter called the "Plan") under the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies, the General Pension Board may determine that the continuous service of employees or former employees of an Employing Company shall not be broken for all or certain purposes of the Plan by reason of the sale of the assets (other than those associated with the Village of Blasdell, Erie County, New York, location) of the Buffalo Tank Division of Bethlehem Steel Corporation (said Division, exclusive of such New York location, being hereinafter called the "Division") to Buffalo tank Corporation of Delaware pursuant to the Agreement of Purchase and Sale, dated July 31, 1986 (hereinafter called the "Agreement"). The intent of the following rules and regulations is to set forth the determinations of the General Pension Board as to the circumstances under which, and for which purposes of the Plan, the continuous service of such employees or former employees shall not be broken.

* * *

C. Employees Hired by Buyer–Not Receiving a Bethlehem Pension

Any Division employee who is (i) accruing continuous service under the Plan as of the Closing, (ii) not eligible for an immediate voluntary pension as of the Closing or eligible for but does not elect to receive an immediate voluntary pension as of the Closing and (iii) employed by the Buyer at or after the Closing shall not be deemed to have broken continuous service under the Plan by reason of his termination of employment with an Employing Company as a result of the sale of the Division.

For such Division employees, service with the Buyer shall be credited as continuous service for purposes of determining vesting and eligibility for immediate voluntary pension, deferred vested pension and surviving spouse's benefits under the Plan but shall not be credited as continuous service for purposes of determining the amount of any pension or surviving spouse's benefit under the Plan (former Bethlehem employees who are not Division employees and who are hired by the Buyer at or after the Closing shall not have service with the Buyer credited as continuous service under the Plan for any purpose). Service will break as of the earlier of the date the person (i) attains eligibility for and elects to receive an immediate voluntary pension based on service with Bethlehem and the Buyer or (ii) permanently terminates employment with the Buyer (in accordance with the rules for determining breaks in continuous service then applicable to employees covered by Bethlehem's pension plans).

A person may elect to receive an immediate voluntary pension benefit under the Plan when he becomes

eligible for such benefit. With respect to a surviving spouse's benefit, eligibility occurs at the date of death in the case of a person who dies while employed by the Buyer.

Accordingly, such a person shall be eligible to receive a pension under the Plan when he meets the requirements for a 65/10, 62/15, 30-year or 60/15 pension under the Plan regardless of whether or not he terminates employment with the Buyer. However, the amount of such pension will be determined in accordance with the provisions of the Plan in effect as of the Closing, using only years of continuous service prior to the Closing and earnings paid prior to the Closing. In addition, any Special Payment then payable under the Plan will be at the level in effect as of December 31, 1985, determined on the basis of the number of vacation weeks which such person was entitled to as of such date reduced by an amount equal to the number of weeks of vacation to which such person is entitled in the year of retirement multiplied by the vacation rate as of December 31, 1985.

* * *

APPENDIX 4

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARGARET C. BLANK, et al.,

Plaintiffs,

vs.

Case No.:
88-867-Civ-J-12

BETHLEHEM STEEL
CORPORATION, et al.,

Defendants.

PRETRIAL STIPULATION

Plaintiffs and defendants, by and through their undersigned attorneys and pursuant to the Court's order of February 17, 1989, submit this as their pretrial stipulation:

* * *

7. Statement of admitted facts.

A. Plaintiffs were all former salaried employees of defendant Bethlehem not represented by a collective bargaining agent or covered by a collective bargaining agreement.

B. The Plan is an employee benefit plan within the meaning of ERISA.

C. Plaintiffs have all met the age and years of service requiremnet for "Rule of 65" pension benefits under the Plan.

D. The Plan is funded by Bethlehem and is non-contributory on the part of the participants.

E. All of the plaintiffs were participants in the Plan.

F. Defendant Plan denied claims made by certain plaintiffs for "Rule of 65" pension benefits.

G. Defendant Plan denied certain of the plaintiffs' appeals of the initial denial of "Rule of 65" pension benefits.

H. Plaintiffs are employees of Buffalo Tank Corporation.

I. Defendants have not retained the right to require Buffalo Tank Corporation to continue the employment of any of the plaintiffs.

J. One of the plaintiffs, Mr. Robert Perry, has been laid off by Buffalo Tank Corporation. Defendants have no obligation to employ Mr. Perry or require his continued employment by Buffalo Tank Corporation. (Subject to appropriate proof.)

K. None of the plaintiffs herein were offered transfers to another position with defendant Bethlehem Steel.

L. None of the plaintiffs voluntarily agreed to the sale of the Division by Bethlehem to Buffalo Tank Corporation.

M. In connection with the sale of divisions of other units of Bethlehem, Bethlehem has, on occasion, advised the Plan Administrator that the sale is to be treated as "a permanent shutdown".

N. In those cases where Bethlehem has advised the Plan Administrator that the sale is to be considered as "a permanent shutdown", salaried employees who met the eligibility requirements were granted shutdown benefits, including "Rule of 65" pension benefits.

O. In cases where Bethlehem declared a sale to be a permanent shutdown, the Plan did not independently further investigate to determine in what fashion, if any, the purchaser intended to, or in fact did, continue to operate the sold facility.

P. In the cases where Bethlehem declared a sale to be a permanent shutdown, the Plan did not independently further investigate to determine if any of the employees were to be employed by the purchasing entity or what wages, benefits, or other terms and conditions of employment, if any, were offered to Bethlehem employees.

Q. In those cases where Bethlehem declared the sale to be a permanent shutdown, eligible salaried employees received shutdown benefits including "Rule of 65" pension benefits regardless of whether or not they were to be employed by the purchasing corporation.

R. In each instance in which Bethlehem sold a division or facility as an ongoing entity, Bethlehem negotiated with the purchaser and obtained an agreement from the purchaser that provided, among other things:

1. The purchaser would offer employment to all of the employees of Bethlehem actively at work on the date of closing in substantially the same positions as they were employed at the closing;

2. The purchaser would establish benefits, benefit plans and rates of pay for Bethlehem employees hired by the purchaser that were substantially the same as those applicable to those employees as of the date of closing;

3. The purchasers' pension plans would provide credit to those individuals employed by the purchaser for prior service as employees of Bethlehem for all purposes under the purchasers' plan (provided that benefits payable under defined benefit plans established by the purchasers could be offset or reduced by any pension benefits received by the employees under the Bethlehem Plan);

4. Bethlehem employees who were employed by the buyer would be credited with service with the purchaser for purposes of determining vesting and eligibility for certain benefits under the Bethlehem Plan;

5. If the purchaser required additional employees after closing, it offers employment first to those employees of the purchased entity who were on layoff status at the time of closing.

S. Mr. Milton Bradshaw was employed by the Wire-rope Division of Bethlehem Steel at its terminal in Jacksonville, Florida prior to the sale of that division by Bethlehem Steel.

T. Bethlehem Steel Corporation sold some of its assets to Broyhill and Associates. That sale was originally negotiated as a sale of an ongoing entity, in which event shutdown benefits such as "Rule of 65" pension would not have been provided and the purchase and sale agreement, a draft of which is identified as plaintiffs' Exhibi

34, would have imposed certain obligations on the purchaser regarding the hiring and benefits treatment of the affected employees.

U. The sale to Broyhill and Associates was consummated as an asset sale and was considered as a permanent shutdown by Bethlehem. One reason that the sale was structured as a shutdown was because agreement could not be reached between Bethlehem, the purchasing company, and the collective bargaining representative of certain hourly employees of the units to be sold on the employment rights and benefits of those employees.

V. The Purchase and Sale Agreement between Broyhill & Associates did not required Broyhill & Associates to offer employment to Bethlehem employees previously employed at the facilities acquired by Broyhill & Associates or to provide those employees with substantially similar wages or benefits to those that they had enjoyed prior to the date of closing. The same is true of the Purchase and Sale Agreement between Greenwood Mining, Bethenergy Mines and Lehigh Coal and Navigation Company and the Purchase and Sale Agreement between Bethlehem Steel and Williamsport Wirerope.

W. Salaried employees of the unit sold to Broyhill and Associates who were eligible received shutdown benefits such as "Rule of 65" pension benefits.

X. For benefit purposes the Williamsport Wirerope Division and the "Panther Valley" Division were treated as shutdowns. It is believed that both facilities are still operating to some unknown degree.

Y. Bethlehem no longer owns the assets sold to Buffalo Tank Corporation.

Z. Bethlehem can no longer operate or run those operations sold to Buffalo Tank Corporation.

AA. Defendant Bethlehem is a Delaware corporation with its principal place of business in Pennsylvania.

BB. On July 31, 1986, Bethlehem entered into a purchase and sale agreement with Buffalo Tank Corporation for sale and purchase of some of the assets of the Division of defendant Bethlehem.

CC. The sale of the Buffalo Tank Division closed on August 1, 1986.

DD. Bethlehem sold its Seattle Division to a purchaser. That purchase and sale agreement provided, among other things, a four year safety net if the purchaser's business failed. Under that safety net, in the event the business failed within 48 months after the date of closing of the sale, the sale would be treated as a shutdown and salaried employees would receive shutdown benefits including "Rule of 65" pension benefits if they were then eligible for such benefits. The benefits treatment provided to those individuals is more fully set forth in Defendants' Exhibit 6. The Seattle Division did not fail and "Rule of 65" benefits were not provided.

EE. Each plaintiff has been treated in accordance with Section 8.01 of the Agreement of Purchase and Sale between Bethlehem and Buffalo Tank Corportation.

FF. Each plaintiff was treated in accordance with Section 5.3(c) of the Plan and the Rules and Regulations

adopted by the General Pension Board pursuant to Section 5.3(c) with respect to the sale of the Division.

GG. No oral representations were made to any plaintiffs by any supervisory or managerial employees of Bethlehem or the Plan which are inconsistent with the terms of the Agreement of Purchase and Sale between Bethlehem and Buffalo Tank Corporation.

HH. No oral representations were made to any plaintiffs by any supervisory or managerial employees of Bethlehem or the Plan which are inconsistent with the terms of the Plan.

II. No oral representations were made to any plaintiffs by any supervisory or any managerial employees of Bethlehem or the Plan which are inconsistent with the Rules and Regulation adopted by the General Pension Board pursuant to Section 5.3(c) of the Plan.

JJ. Each plaintiff received an offer of employment from Buffalo Tank Corporation for a position which was substantially the same as she or he occupied at the time of the closing of the sale.

KK. Each plaintiff received from Buffalo Tank rates of pay established by Buffalo Tank which were substantially the same as those applicable to the plaintiffs while employed at Bethlehem Steel.

* * *

APPENDIX 5

Albert R. VARHOLA, et al., Plaintiffs-Appellants/Cross-Appellees,

v.

CYCLOPS CORPORATION, et al., Defendants-Appellees/Cross-Appellants.

Nos. 89-3506, 89-3507.

United States Court of Appeals, Sixth Circuit.

Aug. 29, 1990.

On Appeal from the United States District Court for the Southern District of Ohio; No. 83-00394. Weber, J.

S.D. Ohio, 820 F.2d 809, APPEAL AFTER REMAND.

AFFIRMING IN PART, VACATING IN PART.

Before KENNEDY and BOGGS, Circuit Judges, and TIMBERS, Senior Circuit Judge. [FN*]

PER CURIAM.

The twelve plaintiffs appeal, and the defendants cross-appeal, an order of the district court resolving the plaintiffs' claims brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. s 1001 et seq. [FN1] The district court found that the plaintiffs were not entitled to certain pension benefits, but were entitled to severance pay, when Cyclops sold the coke plant where they were employed. Finding that the plan administrator's decision to deny pension benefits and severance pay was not arbitrary and capricious, we affirm the denial of pension benefits and vacate the award of severance pay.

I

A

On November 26, 1985, on cross-motions for summary judgment, the district court ordered that the plaintiffs were entitled to "permanent shutdown" pension benefits, which included medical insurance benefits, but granted summary judgment for the defendants on all other counts. On appeal, we affirmed in part and remanded, finding that there were factual issues that needed to be resolved at a trial and instructing the district court to review the plan administrator's determinations under an "arbitrary and capricious" standard of review. Varhola v. Doe, 820 F.2d 809 (6th Cir.1987) ("Varhola I"). Following a three-day bench trial, the district court held that the plaintiffs were not entitled to shutdown pension benefits, but were in that case entitled to severance pay (an issue on which the court had earlier reserved judgment). The plaintiffs appeal the denial of shutdown benefits, and the defendants cross-appeal the granting of severance pay.

Cyclops Corporation (Cyclops) produces steel. Before November 22, 1980, Cyclops operated a steel-making facility, including a coke plant, near Portsmouth, Ohio. In early 1980, Cyclops closed all operations (including the open hearth furnaces and the blast furnace) at the Portsmouth facility except the coke plant, which it operated until August 1980 while trying to find a buyer to purchase the coke plant as a going concern. On August 25,

1980, coke production at the plant stopped, but the ovens were kept hot so as to maintain the plant's ability to resume production. On November 21, 1980, Cyclops sold the coke plant to New Boston Coke Corporation.

B

The plaintiffs claim that the motivation behind Cyclops's attempt to sell the coke-making portion of the Portsmouth facility was to save Cyclops millions of dollars by passing along accrued pension liabilities to the purchaser. Cyclops engaged an actuarial firm to calculate the pension liabilities it would face from shutting down the entire Portsmouth facility. The plaintiffs allege that upon discovering the extent of the liability, Cyclops transferred certain workers who worked in the open hearth and blast furnaces to the coke plant so as to avoid having to pay them retirement or severance benefits. On October 28, 1980, less than a month before the sale, Cyclops convened a meeting with the plaintiffs at which the plaintiffs were informed that they were not entitled to plant shutdown pensions. The plaintiffs claim that this decision was made without regard to the provisions of the company's pension plan. The plaintiffs also allege that the Pension Board never investigated the particular employment circumstances of the individual plaintiffs before ruling on their pension applications. They claim that the Board's disregard for the terms of the plan and its failure to investigate each application constituted arbitrary and capricious behavior.

The Pension Plan for Salaried Employees of Cyclops Corporation, effective November 1980, contains two

retirement benefit provisions (ss 4.7 and 4.8) relevant to this dispute. Under the terms of these provisions, employees were eligible to receive full retirement benefits if their terms of service were broken "because of" or "by reason of" a "shutdown of a division, plant, office or department." In fact, qualifying employees who worked in the open hearth and blast furnace operations were granted pensions. The dispute in this case is whether the coke plant employees suffered a break in their continuous service "because of" a "permanent shutdown" in the same way that the other employees did.

Section 10.1 of the pension plan defines "continuous service" as "service with the Company . . . whether on a salaried or hourly basis. . . . " Section 10.1(e) provides that an employee:

> shall incur a break in continuous service upon:
>
> * * *
>
> (4) termination due to permanent shutdown of a division, plant, office or department, or subdivision of any of them;
>
> * * *

This provision unfortunately sheds no light on the definition of "permanent shutdown."

The parties agree, of course, that the plaintiffs suffered a break in their continuous employment with Cyclops after November 21, 1980. The dispute originally was whether that break in service resulted from a "permanent shutdown" of a plant. Cyclops contended that, although the blast furnace and the open hearth furnaces were shut down, the coke plant was purposely not shut

down. The plaintiffs countered that, as to Cyclops, the coke plant was permanently shut down when it was sold; "permanent shutdown" must be defined in terms of Cyclops's own operation of the coke plant. At trial, the district court resolved this dispute in favor of Cyclops by determining that the plan administrator had not acted arbitrarily and capriciously when it found that there was no permanent shutdown. [FN2] The plaintiffs do not argue on this second appeal that such a finding was clearly erroneous; instead, they argue that the plan administrator acted arbitrarily and capriciously by granting pension benefits to three employees similarly situated to the plaintiffs, by acting under a conflict of interest, and by breaching a fiduciary duty.

When New Boston Coke Corporation agreed to buy the coke plant, it wanted experienced employees to continue the operations. All of the plaintiffs were on a list of 28 employees, designated to remain at the coke plant, that Cyclops provided to New Boston. Cyclops denies that the creation of the list was motivated by a desire to save money on pension costs. The plaintiffs were told, however, that if they refused to work for New Boston, they would not be eligible under the plan for shutdown pensions. All of the plaintiffs decided to work for New Boston. New Boston agreed to assume all accrued pension liabilities, as Cyclops had requested.

On November 21, 1980, plaintiffs' employment with Cyclops ended, and on November 22, 1980, their employment with New Boston began. Cyclops transferred to the New Boston pension plan certain assets worth $60,521 that had been held by the Cyclops pension plan. Those

assets represented the portion of the total Cyclops pension plan assets that could be allocated to the 28 listed employees. The eligibility requirements for pensions at New Boston were identical to those under Cyclops's plan, and New Boston gave credit for all years of service with Cyclops. Five plaintiffs have retired or died, and they or their spouses are receiving benefits under the New Boston plan. Cyclops asserts that had those plaintiffs received the shutdown pensions under the Cyclops plan, they would now be receiving overlapping pension benefits.

Cyclops had also established a severance pay plan, effective November 1, 1980, that provided as follows:

Under certain business conditions it may become necessary for the company to terminate the employment of certain salaried employees and the purpose of the allowance, granted solely at the discretion of the company, and as provided in this policy, is to give financial assistance to such employees to the extent possible.

1. Eligibility:

1.1 A full-time salaried employee of any division's [sic] or corporate office is eligible for a severance allowance if his employment is permanently terminated by the company, because of the curtailment, elimination or revision of the functions being performed by the employee.

1.2 An employee is not eligible for a severance allowance if he is terminated under any of the following conditions:

1.2.1 voluntary resignation

1.2.2 Discharged for cause

1.2.3 Retirement under company plan other than a deferred vested pension.

1.2.4 Pregnancy

1.2.5 Disability under which he is entitled to benefits provided by either a company program or workmen's compensation insurance.

1.2.6 Refusal to accept another position within the company which provides approximately the same current earnings.

II

In remanding this case in the first appeal, we instructed the district court to apply the "arbitrary and capricious" standard to its review of the plan administrator's decision to deny the plaintiffs pension benefits. Varhola I, 820 F.2d at 813-14. Between the time of the decision in Varhola I and the district court's opinion after remand, the Supreme Court decided Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989). In Bruch, the Court determined that an administrator's interpretation of an employee benefits plan under 29 U.S.C. s 1132(a)(1)(B) must be reviewed de novo, unless the benefits plan gives the administrator discretion in distributing benefits. Id. at 956; Adams v. Avondale Industries, Inc., 905 F.2d 943, 945 (6th Cir.1990).

On remand, the district court determined that it was not bound by Bruch, but rather by our order to apply the "arbitrary and capricious" standard of review:

This court is bound by the law of this case as mandated by the United States Court of Appeals for the Sixth Circuit which remanded this case with clear instruction in Varhola v. Doe, 820 F.2d 809 (6th Cir.1987), notwithstanding the effect, if any, of the recent opinion by the Supreme Court of the United States in Firestone Tire & Rubber Co. v. Bruch, 109 S.Ct. 948, ___ U.S. ___ (1989).

The Court of Appeals has instructed that the standard of review of the Cyclops Pension Board's determination to deny plant shutdown pensions to plaintiffs is limited to whether the Pension Board's decision was arbitrary and capricious; this standard was narrowly and explicitly set forth in Varhola, 820 F.2d at 813.

The plaintiffs argue that Bruch altered the standard of review to be applied in benefits cases, and that the district court blindly applied the standard dictated in Varhola I without regard to the intervening change in the law. For this reason, the plaintiffs urge us to reverse the judgment of the district court.

The plaintiffs argue that the Bruch rule applies retroactively to this case. The general practice is that, where the Court makes no statement as to whether a new rule should have retroactive effect, the rule applies retroactively. We have previously assumed that the de novo standard of review rule announced in Bruch is to have retroactive effect. See Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 550 (6th Cir.1989). In this case, however, Bruch does not require the application of a de novo standard of review. The plaintiffs' arguments to the contrary do not withstand scrutiny.

The plaintiffs argue that the exception to the rule mandating a de novo standard of review – where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," Bruch, 109 S.Ct. at 956, as Cyclops's does – is inapplicable to this case for two reasons. First, the Supreme Court divined the exception to the de novo standard of review by reference to trust law; the pension plan at issue is not a trust instrument, and therefore the de novo standard must be applied without exception. Second, as officers of a corporation that wished to save money, the members of the Pension Board were operating under a conflict of interest when making benefits determinations; under these circumstances, Bruch requires that courts more strictly review the actions of administrators who have discretionary authority. [FN3]

We find that the Cyclops pension plan explicitly granted the plan administrator discretionary authority to determine eligibility. Section 12.2 of Cyclops's pension plan states:

(a) The Pension Board shall be the Plan Administrator and Named Fiduciary of the Plan with respect solely to the operation and administration of the Plan and shall have the power, duty and responsibility to:

(1) determine the eligibility of any Employee, Participant, co-pensioner, spouse or beneficiary to participate in or receive benefits under the Plan;

(2) settle any disputes which may arise in the operation of the Plan;

(3) determine the interest of any person in the Plan and Pension Trust;

(4) interpret any provision of the Plan;

* * *

This provision gives the plan administrator (the Pension Board) discretion in construing the pension plan, and under these circumstances, the more deferential "arbitrary and capricious" standard of review applies. See Lakey v. Remington Arms Co., 874 F.2d 541, 544-45 (8th Cir.1989); Curtis v. Noel, 877 F.2d 159, 161 (1st Cir.1989).

The contention that the Pension Board was interpreting a plant contract, not a trust instrument, presents a false distinction. There is no reason to apply a different standard of review to instruments in technically different forms that accomplish identical objectives. "To vary the standard of judicial review for general asset welfare plans would only sow confusion in ERISA, which we decline to do." Holland v. Burlington Industries, Inc., 772 F.2d 1140, 1148 (4th Cir.1985), aff'd mem. sub nom. Brooks v. Burlington Industries, Inc., 477 U.S. 901 (1986). It is significant that the plan in Bruch was not in the form of a trust instrument:

Firestone . . . had not established separate trust funds out of which to pay the benefits from the plans. All three of the plans were either "employee welfare benefit plans" or "employee pension benefit plans" governed (albeit in different ways) by ERISA.

109 S.Ct. at 951. The Bruch Court assumed, therefore, that the same standard of review (de novo) should apply

to all benefits cases, regardless of the form in which the plan is presented, absent a showing of discretionary authority in the administrator.

The plaintiffs' second contention, that a conflict of interest made the "arbitrary and capricious" standard inapplicable, was rejected by the Bruch Court. A conflict of interest does not change the standard of review; rather it is a factor to be weighed in determining whether a plan administrator with discretionary authority abused his discretion (i.e., acted arbitrarily and capriciously). Bruch, 109 S.Ct. at 956. We have adopted the Supreme Court's reasoning. See Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989) ("The fact that the Retirement Committee that administers the plan is composed of management-level employees of KFC is significant only to the extent that any possible conflict of interest should be taken into account as a factor in determining whether the Committee's decision was arbitrary and capricious."), cert. denied, 110 S.Ct. 1924 (1990).

III

Having determined that the "arbitrary and capricious" standard of review applies in this case, we must consider whether the plan administrator acted in an arbitrary and capricious way. Although the plaintiffs do not argue on this appeal that the plan administrator acted arbitrarily and capriciously by determining that the coke plant had not been permanently shut down, they do argue that the plan administrator's decision to deny benefits was arbitrary and capricious for three other reasons. First, Cyclops granted shutdown benefits to three

employees who are claimed to have been similarly situated to the plaintiffs. Second, the administrator was allegedly acting under a conflict of interest. Third, the plaintiffs claim that the administrator breached a fiduciary duty owed to the plaintiffs.

A

Section 12.2(g) of the pension plan states:

All discretionary acts which may be taken under this Section 12.2 by the Pension Board with respect to Employees, Participants, co-pensioners, spouses and beneficiaries shall be uniform and non-discriminatory in their nature in substantially identical situations.

In Varhola I, we noted that if Cyclops had discriminated against the plaintiffs in allocating pension benefits, then it would have been guilty of arbitrary and capricious behavior. 820 F.2d at 816.

We remanded in part because we could not determine from the record whether three employees to whom Cyclops had granted pension benefits (Allard Lawson, a Turn Foreman in the Maintenance Department; John R. Dalton, a General Foreman in the Maintenance Department; and Donald Pitts, a Foreman in charge of Fuel and Utilities in the Maintenance Department) "were indeed similarly-situated to at least some of the plaintiffs." Ibid. On remand, the district court determined that these three employees and the plaintiffs were not similarly situated:

John Dalton, Allard Lawson, and Donald Pitts received plant shutdown pensions because they experienced breaks in continuous service due to the permanent shutdown of the blast furnace and open hearth facilities.

Plaintiffs' break in continuous service was due to the sale of the coke works plant and was not related to the permanent shutdown of the blast furnace and open hearth facilities.

The plaintiffs contend that this finding lacks any evidentiary support and is clearly erroneous.

The plaintiffs claim that they introduced overwhelming evidence at trial that the three named employees (Dalton, Lawson, and Pitts) were similarly situated to them, and that Cyclops did not contradict this evidence. The plaintiffs rely on the testimony of William Cropper, the retired manager of Engineering and Construction at the Portsmouth facility. Cropper was in charge of Dalton, Lawson, and Pitts. Cropper testified that Dalton worked strictly in the coke plant. Cropper further testified that Lawson was transferred to the coke plant, sometime before 1980, after "they shut down the rolling mills." Cropper also testified that Pitts worked as a foreman in the steam plant, which continued to operate in conjunction with the coke plant and was sold to New Boston with the coke plant. Cyclops did not contradict Cropper's testimony that these three employees, who did receive pension benefits, worked exclusively at the coke plant or the steam plant for several years prior to 1980.

We find the evidence sufficient to support the finding that Dalton, Lawson, and Pitts experienced a break in their service at Cyclops due to the shutdown of the

furnaces. Although those three men worked in the coke plant or the affiliated steam plant, they lost their jobs because of the corporate contraction that was necessitated by the shutting down of the furnaces. They were not on the select list of 28 salaried employees designated to stay on with Cyclops after it closed down the furnace operations in early 1980. After much of the operations at Portsmouth was eliminated, Cyclops faced having to consolidate its work forces from the various parts of the facility. Some of the better employees from the furnace operations, for example, were asked to remain during the period when only the coke plant was in operation; some of the less good employees at the coke plant, by contrast, were dismissed, despite the fact that their part of the facility – the coke plant – was still operating. The termination of the employment of Dalton, Lawson, and Pitts was therefore a direct result of the shutdown of the furnace operations. Furthermore, the lists of those employees who were designated to be laid off in early 1980 were prepared by operational personnel; the members of the Board had no input.

The plaintiffs were not terminated for the same reason as Dalton, Lawson, and Pitts. The plaintiffs were valued employees who made the short list of those needed to operate the coke plant. The end of their service with Cyclops came only after Cyclops sold the coke plant in November 1980, at which point the plaintiffs immediately assumed employment with New Boston. The district court's finding of no discriminatory behavior by Cyclops is, therefore, not clearly erroneous.

B

The plaintiffs next claim that the Pension Board, as plan administrator, was acting under a conflict of interest that indicated an abuse of discretion. This claim is based on the fact that Cyclops candidly acknowledges that it saved $4.8 million dollars in pension liabilities by selling the coke plant. Since the members of the Board were officers of the company, they acted with an improper motive (that is, not with the interests of only the plan's beneficiaries in mind) in denying pension benefits to the plaintiffs. The plaintiffs argue that the Board's role as a fiduciary for the beneficiaries cannot be reconciled with its desire to act against the plaintiffs' interest.

The district court found that the Pension Board held a meeting on December 20, 1982 at which the Board determined:

> that the coke plant was not permanently shutdown [sic] as contemplated in the Pension Plan, that no representation was made that Cyclops would guarantee the pension benefits of transferred employees for a period of more than five years and, therefore, that plaintiffs were not entitled to benefits from the Cyclops Salaried Plan.
>
> [T]he Portsmouth coke works were never permanently shutdown [sic], but continued to operate and [ ] employees continued to work there without interruption through the sale of the coke works to New Boston; the Pension Board considered "permanent shutdown" in terms of the physical operation of the works, and not in terms of Cyclops' operation of the coke works. . . . [T]he procedures which otherwise would have been attendant to a permanent shutdown of a coke works were not

undertaken, and the employees who were transferred suffered no interruption in employment.

We agree with the district court that "the fact that this decision resulted in an avoidance of financial liability associated with plant shutdown pensions for these 28 employees does not dictate a conclusion that it was the sole consideration or that it was an improper motive of the Pension Board." The court considered the contention of conflict of interest as one factor in deciding whether the Board acted arbitrarily and capriciously, but determined that other countervailing, legitimate factors dictated a finding of no abuse of discretion.

The plaintiffs have not shown that this finding constitutes clear error. Any alleged conflict of interest on the part of members of the Board is only one factor to be considered in determining whether the Board acted arbitrarily and capriciously. There is no evidence that the district court did not consider a possible conflict of interest as one factor; it simply found this factor outweighed by numerous other indicators of a good faith effort in making benefits determinations.

The plaintiffs' argument logically implies that no application for pension benefits can be determined by an employer-directed plan administrator. We believe that a faithful reading of ERISA does not support their argument. Neither the statute nor the Supreme Court case law, see Bruch, 109 S.Ct. at 956-57, prohibits this arrangement.

C

The plaintiffs' final claim is that the Pension Board breached its fiduciary duties imposed under ERISA. The

Board's decision, which could be interpreted as saving Cyclops millions of dollars in potential pension liabilities, [FN4] allegedly conflicts with its duty under 29 U.S.C. s 1104(a)(1), which states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. . . . " The plaintiffs claim that the Board breached this duty, and the district court clearly erred by finding otherwise. The plaintiffs buttress their argument by referring us to 29 U.S.C. s 1103(c)(1), which provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries. . . . " They claim that the savings in pension payments inured directly to the benefit of Cyclops's treasury.

The plaintiffs also allege that the Board violated its duty under 29 U.S.C. s 1106(b), the self-dealing prohibition, which states:

A fiduciary with respect to a plan shall not –

(1) deal with the assets of the plan in his own interest or for his own account,

(2) . . . act in any transaction involving the plan on behalf of a party . . . whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

The Board's dual loyalties purportedly led it to violate s 1106. It is the plaintiffs' position that the denial of benefits violated the statute and constituted arbitrary and capricious behavior.

This final claim must fail because we have already held that Cyclops did not violate the fiduciary duty provisions of ERISA. In Varhola I, we held that Cyclops did not engage in self-dealing. 820 F.2d at 818. Having already determined that Cyclops has no liability under s 1106, we have no cause to reconsider that holding. For the foregoing reasons, we affirm the denial of pension benefits.

IV

Cyclops cross appeals the award of severance pay. After having agreed with the plan administrator at trial that the plaintiffs were not arbitrarily denied pension benefits, the court summarily determined that the plaintiffs were entitled to severance pay benefits. Cyclops claims that this determination is unsupported by the record.

The district court offered no support for its one-sentence legal conclusion: "Plaintiffs' employment with Cyclops was terminated on November 21, 1980 and, therefore, plaintiffs are entitled to severance allowance as a matter of contract and pursuant to the terms of the severance pay program." It did not explain how the plan administrator acted arbitrarily and capriciously in denying severance pay. [FN5] We agree with Cyclops that the court's conclusion ignores the case law in this circuit and the plain language of the severance plan.

In Adcock v. Firestone Tire and Rubber Co., 822 F.2d 623, 627 (6th Cir. 1987), a pre-Bruch case, we held that the denial of severance pay is appropriate where the sale of the plaintiffs' plant as a going concern does not result in

the plaintiffs' unemployment. In Adams v. Avondale Industries, Inc., 905 F.2d at 950, we held that the unambiguous terms of a severance pay plan denied benefits to salaried employees who chose to remain after the sale of the facility to work for the acquiror corporation. Under those circumstances, the plaintiffs were not entitled to severance pay. [FN6]

The plaintiffs here are not entitled to severance pay because they do not meet the plan's eligibility requirements. Section 1.1 of the plan states that a full-time salaried employee is eligible for severance pay "if his employment is permanently terminated by the company, because of the curtailment, elimination or revision of the functions being performed by the employee." The district court did not find, and the plaintiffs did not allege, that the functions performed by the plaintiffs were eliminated by Cyclops. Rather, Cyclops terminated the plaintiffs because it sold the coke plant to New Boston, where the plaintiffs continued in the same roles they had occupied for Cyclops. Under these circumstances, the plan administrator did not act arbitrarily and capriciously in denying the plaintiffs severance pay.

Because ERISA affords the plaintiffs no relief, the denial of pension benefits is AFFIRMED, and the award of severance pay is vacated and REVERSED.

FN*. The Honorable William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

FN1. The plaintiffs are former employees of the Cyclops Corporation or, in the case of one deceased plaintiff, a representative. The defendants are the Cyclops Corporation; the Pension

Plan for Salaried Employees of Cyclops Corporation; William D. Dickey (Vice-President and Chief Financial Officer), Robert A. Kushner (Vice-President and General Counsel), and Donald E. Mitchell (Controller), the three individual members of the Plan's Pension Board (the "plan administrator" under ERISA); and the Program of Hospital-Medical Benefits for Eligible Pensioners and Surviving Spouses of Cyclops Corporation.

FN2. In Varhola I, we held that the mistake the district court made the first time around was determining for itself on a motion for summary judgment that, in effect, there had been a permanent shutdown, rather than determining whether the plan administrator had drawn an arbitrary conclusion that there had not been a permanent shutdown.

FN3. The Court in Bruch held:

Thus, for purposes of actions under s 1132(a)(1)(B), the de novo standard of review applies regardless of whether . . . the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "factor[] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts s 187, Comment d (1959). 109 S.Ct. at 956-57. Section 187 of the Restatement provides that "where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion."

FN4. The breach of fiduciary duty argument rests on the notion that Cyclops actually achieved a net financial gain by passing on pension liabilities to New Boston. However, it appears that New Boston likely assumed a liability equal to the one Cyclops surrendered ($4.8 million), New Boston may well have received from Cyclops some offsetting compensation (most likely in the form of a reduced purchase price). Under this scenario, Cyclops would not have saved money by having New Boston assume the pension liabilities. As noted in this section, even if it did save money, it did not violate ERISA.

FN5. We believe that the terms of the severance pay plan grant the plan administrator sufficient discretion so that the "arbitrary and capricious" standard of review applies to the severance pay issue. Bruch, 109 S.Ct. at 956.

FN6. Judge Guy noted in dicta that the only post-Bruch circuit opinion to face this issue "held that the sale of a going concern effected a 'termination' of employment requiring payment of severance benefits. Ulmer v. Harsco Corp., 884 F.2d 98, 104 (3d Cir. 1989)." Adams v. Avondale Industries, Inc., 905 F.2d at 950 n. 3. In Ulmer, however, the severance pay plan obligated the company to make severance payments to employees who could not be provided "continuing employment." The court determined that "continuing employment" meant employment with the company, not with the buyer of the division in which the employees worked. The Ulmer court was not persuaded by the reasoning of other cases that reached the opposite conclusion, because "many of these cases

involve plans that give their administrators significantly more discretion than did the plan at issue here." 884 F.2d at 104. Ulmer, therefore, can be distinguished from this case by the explicit discretion that the Cyclops severance pay plan gave the plan administrator in determining who is eligible for benefits.